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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

RAYMOND BROOKS,

Plaintiff and Appellant,

v.

CITY OF SAN JOSE, et al.,

Defendants and Appellants.

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H022091

(Santa Clara County Superior Court No. CV 755625)

Prior to becoming the fire chief of defendant City of San Jose (City), plaintiff Raymond Brooks negotiated a contract that provided that he would be terminated only for cause and that he would receive a 90 to 120 day notice period prior to any such termination. After plaintiff's employment was terminated without notice, he brought an action against the City and City Manager Regina Williams for breach of contract and for violation of his civil rights under 42 U.S.C. section 1983. On appeal, plaintiff raises contentions relating to the interpretation of the City charter, equitable estoppel, and due process. The City has filed a cross-appeal that raises contentions relating to the City charter, the Tort Claims Act, and the enforceability of the contract. For the reasons stated below, we affirm.

I. Statement of Facts

In January 1994, the City had been without a fire chief for approximately one and a half years, and had conducted two unsuccessful rounds of interviews for the position. At that time, the fire department was deeply divided along race and gender lines and the union was very powerful. The fire department also faced numerous other challenges, including the lack of a permanent command structure, deteriorating equipment, and budgetary restrictions. Plaintiff applied for the position and became the leading candidate.

Prior to accepting the position, plaintiff had several discussions with then City Manager Les White and then Assistant City Manager Regina Williams. White and Williams informed plaintiff of the many difficulties facing the fire department. White also told plaintiff that the grand jury was investigating the department, and that the City was waiting for its report. Plaintiff heard about the fire department's problems from other sources as well.

Plaintiff was aware that he would be entering employment as an unclassified employee and that his employment status would be "under the authority of the city manager." Thus, plaintiff was concerned that his employment would be affected by political shifts in city government or the union. He was also concerned that he would not vest in the fire department's retirement plan for 20 years. Plaintiff informed White that he wanted a guarantee of specific protections, including termination only for just cause, a notice period before any involuntary separation, and vesting in the pension plan in five years rather than twenty.

Plaintiff's discussions with White and Williams on these issues resulted in a draft letter, dated March 28, 1994, from White.[1] The letter stated that plaintiff's appointment was effective on April 6, 1994. The letter confirmed plaintiff's

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[1] The City Council confirmed the appointment of Brooks as fire chief on March 1, 1994.

starting salary, reimbursement for relocation costs, and benefits. The last paragraph contained language that is the subject of the instant controversy. It read: "The position of Fire Chief is under the authority of the City Manager and the appointment and removal from the position is at the discretion of the City Manager. The City does not provide severance pay in the event of involuntary separation. However, please be assured that in the event of an involuntary separation, absent an illegal, immoral or unethical act, or an act of extreme misjudgment, I would work with you to ensure an adequate amount of advance notice to afford the normal professional courtesies (normally 90-120 days). I believe it to be of mutual benefit to the City and to you that any separation of employment would only be for just cause and handled in a professional manner." Based on this draft letter and his discussions with White and Williams, plaintiff accepted the position and moved to San Jose. Plaintiff began work on April 6, 1994.

The City confirmed plaintiff's appointment in a letter dated July 5, 1994, after he had begun working as fire chief. In this letter White repeated the City's commitment to plaintiff. The letter stated: "When you were first appointed, I sent you a draft appointment letter which was never formalized and signed by both of us. Given the discussions regarding your retirement, I wanted to ensure that the commitments and understandings under which you were appointed are memorialized in writing."[2] The letter also contained a paragraph regarding involuntary separation that was identical to the paragraph in the March 28 letter.

In August 1994, White resigned from his position and Williams was appointed city manager. The problems in the fire department continued. In June 1995, members of the union held a vote of "no confidence" on plaintiff. The vote

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[2] The city passed an ordinance to make the position of fire chief part of the federated system, thereby making it possible for the fire chief to vest in five years rather than twenty.

reflected discontent over the perception that plaintiff was favoring certain candidates for appointments and promotions and that he lacked a vision for the direction of the fire department.

In July 1995, a controversy arose over the battalion chief's exam, which was an exam to determine the list of candidates eligible for promotion to the rank of battalion chief. Plaintiff was accused of leaking information about the exam to African-American candidates. He was also accused of picking the evaluators for the exam in order to give an advantage to these same candidates. Several firefighters brought a lawsuit against plaintiff and the City. Trial was set to begin in January 1996.

After conducting an investigation of the allegations regarding the battalion chief's exam, the City concluded that there had been no wrongdoing. Nevertheless, negative articles about the fire department appeared in the newspaper daily. Williams hired an "executive coach" to assist plaintiff and to perform an assessment of the fire department. Eventually Williams concluded that the fire department needed a new fire chief.

On November 22, 1995, the Wednesday before Thanksgiving, Williams met with plaintiff for a scheduled performance evaluation. Williams told plaintiff that she was "tired of all the complaints," and asked him to resign, saying that she "need[ed him] gone in thirty days." She also told him that if he did not resign, he would be fired. Williams told plaintiff to think about it over the weekend and that they would meet on the Monday following Thanksgiving. Before Williams left her office that afternoon, a newspaper reporter contacted her regarding whether she had asked for plaintiff's resignation. Williams declined to comment.[3] There was extensive media coverage over the Thanksgiving weekend about the requested resignation and the problems of the fire department.

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[3] It was not established at trial who contacted the media.

On Monday, November 27, 1995, plaintiff and his attorney met with Williams and the city attorney. Plaintiff's attorney indicated that plaintiff did not want to work where he was not wanted and he requested that plaintiff have some time to prepare to make a graceful departure. Williams replied, "This needs to end by the end of the day." Williams told plaintiff that he must either resign or he would be terminated.

Plaintiff declined to resign and Williams terminated his employment on November 27, 1995. Williams issued a public statement in which she announced that plaintiff's employment had been terminated "when he decided not to take advantage of the opportunity that City Manager Williams had provided for him to resign." Williams also stated: "I want to make it clear that this termination had absolutely nothing to do with the Battalion Chief examination. A thorough investigation of this issue by my staff conclusively demonstrated that the Battalion Chief examination was in no way compromised; nor have I learned anything since the investigation which shakes my confidence in the integrity of the examination. . . . did not base my decision to terminate the Fire Chief on any allegations of misconduct, but on my need to have full confidence in the leadership abilities of my department head."

Plaintiff spent the next ten months looking for work. He was eventually hired as deputy fire chief for Birmingham, Alabama. Plaintiff was later promoted to fire chief.

On February 1, 1996, plaintiff filed a complaint against the City and Williams. He alleged damages for breach of contract and for violation of his civil rights under 42 U.S.C. section 1983.[4]

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[4] Brooks also sought a writ of mandate. He later requested dismissal, which was granted.

Prior to trial, the trial court ruled that the city manager was not authorized to make the fire chief position terminable only for just cause. Thus, the trial focused on the provisions of the agreement that promised plaintiff notice of 90-120 days before termination. At the end of testimony, the trial court granted defendants' motion for directed verdict with respect to the personal liability of Williams, and dismissed the claims against her. The jury found in favor of plaintiff on all causes of action. The jury found that a contract had been formed and breached, that plaintiff had a property interest of which he had been deprived without due process, and that plaintiff was also deprived of a liberty interest without a hearing to clear his name. The jury awarded plaintiff economic damages in the amount of $98,800 and non-economic damages in the amount of $461,000.

The City subsequently filed a motion for judgment notwithstanding the verdict on the ground that there was insufficient evidence to support the jury's verdicts on the constitutional claims. The trial court granted the motion and ordered judgment in favor of plaintiff only on the contract cause of action. Thus, plaintiff was awarded damages in the amount of $98,800.

II. Discussion

A. Appeal

1. Termination for Just Cause

Plaintiff first contends that the trial court erred by ruling that the City was not authorized under its charter to enter into a contract in which his employment could be terminated only for cause.[5]

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[5] The City has also raised this issue in its cross-appeal. The City contends that the trial court erred in denying its motion for summary judgment, because, as a matter of law, the City may not alter the at-will status of the fire chief. Since we resolve this issue on appeal in favor of the City, we do not consider the issue in the cross-appeal.

The California Constitution authorizes a city to adopt a city charter. (Cal. Const., art. XI, § 3, subd. (a).) The provisions of the charter are enacted by a vote of the people. (Gov. Code, §§ 34457, 34458.) "A charter bears the same relationship to ordinances that the state Constitution does to statutes." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1034.) "[T]he charter represents the supreme law of the city, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. In this regard, the charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation." (*Domar Electric, Inc. v. City of Los Angeles (Domar)* (1994) 9 Cal.4th 161, 170, internal citations and quotation marks omitted.) Any act by a city "that is violative of or not in compliance with the charter is void." (*Id.* at p. 171.)

"[W]e construe the charter in the same manner as we would a statute. Our sole objective is to ascertain and effectuate legislative intent. We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history." (*Domar*, *supra*, 9 Cal.4th at pp. 171-172, internal citations omitted.) In construing such language, our review is de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

The City Charter of San Jose divides the City's civil service system into "Classified Service" and "Unclassified Service." (Charter, § 1101.)[6] "The Unclassified Service shall comprise and include all of the following officers and employees: . . . the head of each department . . . ." (Charter, § 1101, subd. (a)(3).) Only classified employees are entitled to the protection of not being dismissed

"except for cause." (Charter, § 1104.) The charter also provides that the city manager appoints the heads of all departments (other than the city attorney, the city clerk and the city auditor) and that they "serve at his or her pleasure." (Charter, § 901.)[7] "Serving at pleasure means one is an at-will employee who can be fired without cause." (*Hill v. City of Long Beach* (*Hill*) (1995) 33 Cal.App.4th 1684, 1693.)

"A civil service system is traditionally thought to protect lower level employees, who exercise little or no discretion in matters of public policy, from having their jobs depend on the whims of elected officials, while leaving higher level managers, who exercise much more discretion, unprotected and thus more responsive and accountable to political events, elected officials, and, ultimately, the electorate." (*Hill*, *supra*, 33 Cal.App.4th at p. 1694.)

In the instant case, the charter is consistent with the purposes of a civil service system by creating a class of employees who are entitled to termination "for cause," and a class of higher-level employees who are not. The fire chief, as a department head, is explicitly included as a member of the unclassified employees who are not entitled to the termination "for cause" and other protections of classified employees. Thus, pursuant to the charter, the city manager is authorized to terminate the fire chief's employment without being required to establish reasons or cause for the termination.

Though conceding that the charter provides for the at-will employment status of the fire chief, plaintiff contends that the charter did not prohibit the city

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[6] All citations to the charter are to the provisions in effect in 1995.

[7] Section 901 is subject to the provisions of section 411.1. Section 411.1 states in relevant part: "Prior to appointing any Department head, the City Manager shall submit to the Council, for its review, the responses to the Council's questions submitted by the proposed appointee, and shall seek the Council's advice and consent. The appointment shall be made only if the Council, by the affirmative vote of a majority of its members, advises the City Manager that it concurs with the proposed appointment."

manager from entering into a contract that provided that plaintiff's employment could be terminated only for just cause. He maintains that the contract was formed pursuant to the express exceptions permitted by the charter.

Plaintiff first relies on section 800 of the charter, which is entitled "Administrative Organization: General Provisions" and specifies the powers and duties of the city council. Plaintiff cites the following language in section 800: "The Council, in its discretion, may at any time establish such City offices, departments and agencies, in addition to those established by this Charter, as it may desire . . . . The Council may at any time add to, take away, reduce or otherwise change the respective functions, powers and duties of any of the above mentioned offices, departments and agencies." (Charter, § 800, subd. (a).) However, section 800 refers only to the city council's authority to establish or change the "functions, powers and duties" of "City offices, departments and agencies." This language makes no reference to the city manager's authority to hire a department head as a classified employee.

Plaintiff also relies on language in section 800 that authorizes the city council to contract with a "'private agency' for the exercise or performance by a 'private agency' or jointly by a 'private agency' and the City for or on behalf of the city, of any of the powers, duties or functions of any office, department or agency established by or pursuant to the provisions of this article." (Charter, § 800, subd. (b)(4).) A "private agency" is defined as "any private corporation, firm, association, organization or person." However, this type of contract is not applicable to the instant case, because the charter specifically limits these contracts for services to one year. (Charter, § 800, subd. (b).)[8]

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[8] "Each such contract . . . shall be terminable by the City at any time following the expiration of one (1) year . . . ." (Charter, § 800, subd. (b).)

Plaintiff next focuses on section 1109, which sets forth certain exceptions and exclusions to the civil service provisions.[9] Section 1109 provides that the civil service provisions do not apply to those individuals, who may be hired to provide the services discussed in section 800 or to the City Attorney (Section 803). Section 1109 also states that the city council may authorize contracts with a "person," who performs "particular services or work, for or on behalf of . . . [a] department . . . unless such is prohibited by the provisions of any other Article of this Charter." Section 1109 further states that such individuals are "independent contractors," who "shall not be subject to the Civil Service provisions" of the charter. Plaintiff contends that section 1109 allows the city council, through its

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[9] Section 1109 provides: "The provisions of this article shall not be deemed to apply to, nor in any way limit the Council in, the Council's exercise of any of the powers granted to it by the provisions of sub-section (b) of Section 800, or by the provisions of Section 803, of the Charter. All transfers or consolidations of functions, and all contracts, resulting from the exercise by the Council of such powers shall be deemed exempt from the Civil Service provisions of this Charter, and all persons employed or whose services are contracted for, pursuant to any such transfer, consolidation or contract shall be deemed, for Civil Service purposes, to be independent contractors and not officers or employees within the Civil Service of the City, regardless of the extent, if any, of any supervision or control which may be exercised over such persons or their activities by any officer or employee of the City. Also, the Council may at any time, or from time to time, authorize or direct the execution of contracts between the City and any public or private body, entity, firm organization, association or person, for the conduct or making of any special study, inquiry, investigation or examination, or for the preparing or doing of any special or particular services or work, for or on behalf of the City or any office, department or agency thereof, unless such is prohibited by the provisions of any other Article of this Charter, without complying with the provisions of this Article; and all persons with whom such contracts are made shall be deemed, for Civil Service purposes, to be independent contractors and not officers or employees within the Civil Service of the City, regardless of the extent, if any, of any supervision or control which may be exercised over such persons or their activities by any officer or employee of the City. In addition, the appointment by the Council of any person to any office, pursuant to authority granted to the Council by this Charter, shall not be subject to the Civil Service provisions of this Charter."

city manager, to contract with individuals "outside of the civil service system" to the extent deemed necessary. However, the charter specified that plaintiff, a department head, was an unclassified employee. He had vacation, sick leave, and retirement benefits. Thus, he was not an independent contractor.

Plaintiff also contends that section 1101, subdivision (c) provides the requisite authorization for the city manager. As previously noted, section 1101 designates certain employees as classified and others as unclassified. Subdivision (c) states: "Nothing herein shall be construed as precluding the appointing authority from filling any position in the manner in which positions in the Classified Service are filled." Thus, plaintiff argues that this language authorizes the city manager to fill a position in the unclassified service, in his or her discretion, with an employee who has classified status. However, the manner in which a position is filled in the classified service is through the competitive examination and eligibility list process. (Charter, §§ 1100, 1102.) Thus, this section allows the city manager to hire employees to unclassified positions either with or without the examination and eligibility list procedures specified for classified employees. Section 1101, subdivision (c) does not alter the status of a position in either the classified or unclassified service.

Relying on sections 4.04.010 and 4.04.075 of the Municipal Code, plaintiff next contends that the city council delegated its power to the city manager to enter into contracts, including the contract at issue in the instant case.[10] Though these

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[10] Municipal Code section 4.04.010 defines the scope of contract authority delegated to the city manager to include "[a]greements for personal services, including agreements with independent contractors and employees . . . ." Municipal Code section 4.04.075 authorizes the city manager to make certain contracts without prior approval from the city council. It states: "This chapter shall not limit the authority conferred by the city council: [¶] A. Through other previously enacted provisions of this code which authorize the city manager or a department head to enter into certain specified types of contracts; or [¶] B. Through resolutions delegating authority to a city officer or official to negotiate

provisions define the types of contracts that the city manager is authorized to make, they do not authorize the city manager to enter into a contract that is contrary to the charter. In fact, Municipal Code section 4.04.070 states that "[t]his chapter [dealing with contract authority] shall not authorize any city officer or official to enter into and execute any contract which: (A) Such officer or official is otherwise prohibited from entering into and executing under the provisions of the city charter . . . ."

Plaintiff also contends that the charter "authorizes the City Manager to hire and fire as he 'deems necessary.'" There is no support for this contention in the charter. Plaintiff relies on section 701, subdivision (a), which states in relevant part: "Subject to the Civil Service provisions of this Charter and of any Civil Service Rules adopted pursuant thereto, . . . the City Manager shall appoint all officers and employees of the City; and, when he or she deems it necessary for the good of the service, the City Manager may, subject to the above-mentioned limitations, suspend without pay, demote, discharge, remove or discipline any City officer or employee who under this Charter is appointed by the City Manager." However, this provision refers to the ability of the city manager to discipline or discharge an employee, not to the hiring process.

Plaintiff also relies on *Domar*, *supra*, 9 Cal.4th 161. However, *Domar* does not support plaintiff's position. In *Domar*, the plaintiff's bid on a city project was rejected because it did not comply with the city's minority outreach program. The plaintiff argued that the city was required by its charter to accept its bid as the lowest and best responsible bidder. Our Supreme Court discussed the role of the city's charter in evaluating municipal power, and concluded that "the mere failure of the City's charter to expressly grant the power to require bidders to conduct subcontractor outreach does not render the outreach program void." (*Id.* at p.

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and execute contracts on the city council's behalf without the further approval of the city council."

171.) The court then considered whether the city's imposition of the minority outreach requirement on all bids was in conflict with the charter. (*Ibid.*) Since there was no charter provision that expressly prohibited the city from adopting a requirement relating to minority outreach, the court examined the validity of the requirement as it related to the purposes of competitive bidding. It determined that the outreach program would not conflict with the purposes of public bidding, which included guarding against favoritism, preventing waste and corruption, and obtaining the best economic result for the public. Thus, the court found that the outreach program, which increased the opportunities for minority subcontractors, did not conflict with the charter provision requiring the city to accept the lowest and best responsible bidder. (*Id.* at pp. 172-73.)

Relying on *Domar*, plaintiff contends that "the City may not simply label Chief Brooks as an 'unclassified' employee and argue that this status impliedly precludes any contract protections." We disagree. Here the charter provisions limit the City's power over the appointment and discharge of its employees. The charter expressly provides that the fire chief is an unclassified employee, who serves "at the pleasure of" the city manager. Thus, the fire chief is an at-will employee under the express terms of the charter. As the *Domar* court stated, "[a]ny act that is violative of or not in compliance with the charter is void." (*Domar*, *supra*, 9 Cal.4th at p. 171.) Any contract that provides that the fire chief would be terminated only for just cause is in direct conflict with the charter, and thus is void. Accordingly, the trial court did not err by ruling that the City was not authorized under its charter to enter into a contract in which plaintiff's employment could be terminated only for cause.

2. Estoppel

Plaintiff next contends that the City should be estopped from denying the validity of the contract.

As this court has stated, "[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. This general principle, however, has two important qualifications. The first is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public. . . . The second qualification is the rule that estoppel cannot expand a public agency's powers. Thus, principles of estoppel are not invoked to contravene statutes and constitutional provisions that define an agency's powers." (*Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893, internal citations and quotation marks omitted.) Here plaintiff's claimed status is directly contrary to the terms of the charter. Accordingly, "estoppel cannot create contractual duties where compliance with the charter is lacking." (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 669.) Thus, the trial court did not err in finding that the doctrine of equitable estoppel was inapplicable.

3. Property Interest

Plaintiff also contends that the trial court erred in granting the City's motion for judgment notwithstanding the verdict. He contends that the City's failure to provide a 90-120 day notice period prior to involuntary separation deprived him of a property interest in continued employment. Thus, he contends that since this property interest is protected by the Due Process Clause of the United States Constitution, he was entitled to a hearing prior to the termination of his employment without notice.

Generally, an appellate court that is reviewing a judgment notwithstanding the verdict will determine whether the record, viewed most favorably to the party securing the verdict, contains any substantial evidence to support the verdict. However, here the issue deals solely with the application of the constitution to the facts supporting the verdict. Thus, the issue before this court is a question of law,

which this court reviews de novo. (See *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 718-719.)

In *Board of Regents of State Colleges v. Roth* (*Roth*) (1972) 408 U.S. 564, the state university informed a non-tenured teacher that he would not be rehired after his first year of employment. The teacher then brought an action in which he alleged that he had been denied procedural due process. (*Id.* at p. 568.) The *Roth* court explained that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." (*Id.* at pp. 569-570.) In defining these interests, the court stated: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id.* at p. 577.) As an example of a property interest, the court referred to a case involving a claim of entitlement to welfare benefits pursuant to statute. (*Id.* at p. 578.) Applying these principles to the non-tenured teacher, the court concluded that the terms of his employment secured no interest in re-employment beyond one year, and there were also no statutes or university rules that created a legitimate claim. Accordingly, the court held that the non-tenured teacher had no property interest in his employment status. (*Id.* at p. 579.)

In *Perry v. Sinderman* (1972) 408 U.S. 593, after a non-tenured teacher's contract was not renewed, he brought an action alleging, among other things, that he had been denied procedural due process. Though the teacher did not have tenure, he claimed that the college guidelines established a de facto tenure program. (*Id.* at p. p. 600.) Relying on the principles articulated in *Roth*, the court

concluded that there was a factual issue as to whether the teacher could establish the existence of rules and understandings created by state officials, which justified the teacher's claim of entitlement. (*Id.* at pp. 602-603.)

In *Thomas v. City of Los Angeles* (1987) 676 F.Supp. 976, the zoo director was repeatedly told that his employment would not be terminated without just cause. His position was labeled "exempt," but the city cited no statute, ordinance, or other document that defined an exempt employee. Thus, the court found that the zoo director's supervisors did not violate any statute in making the representations as to his status. (*Id.* at p. 983.) Based on this record, the court held that the zoo director had a property interest in his position. (*Id.* at p. 985-986.)

Roth, *Perry*, and *Thomas* turned on the question of whether a party could establish a right to continued employment. Here there were no "existing rules or understandings" that defined a property interest. The charter expressly provided that plaintiff had no right to continued employment. In contrast to *Thomas*, here the City's charter stated that the fire chief served at the discretion of the city manager. Plaintiff argues, however, that he had "a property interest in the notice period because it was an entitlement that could not be removed except 'for cause.'" There is no merit to this argument. As previously discussed, the city manager could not enter into a contract that provided plaintiff could be terminated only for cause. For these same reasons, the city manager could not enter into a contract that provided plaintiff could be terminated only for cause during the 90 – 120 day notice period.

4. Liberty Interest

Plaintiff contends that the trial court erred in granting the City's motion for judgment notwithstanding the verdict where there was substantial evidence that he was deprived of due process when the City failed to provide him with a hearing to clear his name.

In reviewing a judgment notwithstanding the verdict, an appellate court views the evidence most favorably to the party who obtained the jury verdict, and must reverse if there was substantial evidence to support the verdict. (*Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 343.)

A plaintiff is deprived of a liberty interest when he suffers a tangible loss, such as termination of employment, along with a "charge against him that might seriously damage his standing and associations in his community" by impugning his "good name, reputation, honor, or integrity" or a charge that "impose[s] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." (*Roth*, *supra*, 408 U.S. at p. 573.) A public official must publicize the statements implicating the plaintiff's liberty interest. (*Bollow v. Federal Reserve Bank of San Francisco* (9th Cir. 1981) 650 F.2d 1093, 1101.) "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (*Roth*, *supra*, 408 U.S. at p. 573, internal citations and quotation marks omitted.)

Here there was no substantial evidence to support the jury's finding that plaintiff had been deprived of a liberty interest. The City issued a press release that stated in relevant part: "Williams stated, 'I want to make it clear that this termination had absolutely nothing to do with the Battalion Chief examination. A thorough investigation of this issue by my staff conclusively demonstrated that the Battalion Chief examination was in no way compromised; nor have I learned anything since the investigation which shakes my confidence in the integrity of the examination.' [¶] Williams said, 'I did not base my decision to terminate the Fire Chief on any allegations of misconduct, but on my need to have full confidence in the leadership abilities of my department head."

Plaintiff argues that the City charged him with inappropriate conduct through "implication and suggestion." He claims that Williams' statements in

light of the 1994 appointment letter created the impression that he had compromised the battalion chief examination. He points out that Williams defended the examination, but not plaintiff, and thus he was "slurred by omission." However, plaintiff's interpretation ignores Williams' specific statements that the "termination had absolutely nothing to do with" the examination and that she did not base her decision on any allegations of misconduct.[11] Thus, even viewing the statements in favor of the verdict, Williams' statements did not impugn plaintiff's good name, reputation, honor, or integrity.

Plaintiff also argues that when his employment was terminated without notice, those who read his 1994 appointment letter would have received the impression that his employment was being terminated for wrongdoing. This letter stated that in the absence of an illegal, immoral or unethical act, or an act of extreme misjudgment, he would receive 90-120 days' notice prior to involuntary termination, and that he would not be terminated without cause. However, there was no evidence that anyone other than plaintiff, Williams, and White had ever read this letter. There was no evidence that the letter was part of his personnel file.[12] Accordingly, since the appointment letter was not published, it could not be considered in conjunction with the press release to implicate plaintiff's liberty interest.

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[11] Plaintiff also testified that Williams and the City continued to defend him in connection with the battalion chief examination at the subsequent trial on the controversy.

[12] In his opening brief, plaintiff asserts that he testified that his personnel file would be available to future employers. However, plaintiff has mischaracterized the evidence presented at trial. Plaintiff testified that potential employers would contact past employers, including the City. There was no testimony as to whether the letter was in his personnel file or whether the file was accessible to potential employers or others.

B. Cross-Appeal

1. Notice Period

In *Miller v. State of California* (1977) 18 Cal.3d 808, 813-814, the California Supreme Court stated that "public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." Relying on *Miller*, the City contends that the city manager was not authorized to agree to a notice period prior to termination. *Miller*, however, is distinguishable from the instant case. In *Miller*, a statute was amended and changed the mandatory retirement age for state employees from 70 to 67. (*Id.* at p. 811.) The court held that an implied contract based on the fact that the plaintiff held a civil service position could not circumvent the statutory provisions governing the terms and conditions of civil service employment. (*Id.* at p. 814.) Here there are no statutes governing notice provisions for at-will employees. Nor is plaintiff contending that the terms of his employment could be inferred from his position as an unclassified employee.

The City also relies on *Hill*, *supra*, 33 Cal.App.4th 1684. In *Hill*, the plaintiff initially held a position as a classified employee whose employment could only be terminated for cause. (*Id.* at p. 1688.) He was later promoted to an unclassified position from which he was subsequently terminated. (*Ibid.*) The plaintiff brought a breach of contract action in which he alleged that his employment had been terminated without cause in violation of an implied contract based on his prior classified position. In contrast to *Hill*, here there was an express contract providing for a notice period prior to termination.

At issue here is whether the City charter authorized the City to enter contracts concerning the terms of employment for unclassified employees. As previously discussed, the City was not authorized to enter a contract providing that plaintiff's employment could be terminated only for just cause, since this

provision was in direct conflict with the charter. However, the charter contains no provision relating to other terms of employment for unclassified employees, such as a notice period. And the charter's failure to specifically authorize or forbid the City to provide a notice period for unclassified employees does not render this provision in the City's contract with plaintiff void. (See *Domar*, *supra*, 9 Cal.4th at p.171.) The validity of a term relating to a notice period "must be ascertained with reference to the purposes" of a civil service system that includes unclassified employees. (*Id.* at pp. 172-173.) The purpose of such a system is to maintain "maximum responsiveness on the part of those holding high-echelon or 'sensitive' positions" and to provide a municipality the flexibility to hire quality candidates given the "'impracticability of recruitment via civil service.'" (*L.A. County Employees Association v. Superior Court* (2000) 81 Cal.App.4th 164, 171, quoting *Placer County Employees Assn. v. Board of Supervisors*, *supra*, 233 Cal.App.2d at p. 558.) Here entering into contracts that provide a notice period for unclassified employees gives the City some flexibility in attracting and hiring highly qualified candidates, such as plaintiff. Since the contract term providing notice prior to termination did not conflict with the charter, it was not void. Accordingly, the trial court did not err in failing to grant the City's motion for a directed verdict.

2. Government Tort Claims

Generally an individual cannot sue a California government entity without first having filed a claim with that entity. (§ 945.4.) "The claim presentation requirement serves several purposes: (1) it gives the public entity prompt notice of a claim so that it can investigate the strengths and weaknesses of the claim while the evidence is still fresh and the witnesses are available; (2) it affords opportunity for amicable adjustment, thereby avoiding expenditure of public funds in needless litigation; and (3) it informs the public entity of potential liability so that it can better prepare for the upcoming fiscal year." (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 279.)

Some cases have held that a claim is not required when a plaintiff brings a cause of action based in contract. (*National Automobile & Cas. Ins. Co. v. Pitchess* (1973) 35 Cal.App.3d 62; *Harris v. State Personnel Bd.* (1985) 170 Cal.App.3d 639.) However, more recent authority has reached the opposition conclusion. (*Baines Pickwick Ltd. v. City of Los Angeles* (1999) 72 Cal.App.4th 298; *Hart v. Alameda County* (1999) 76 Cal.App.4th 766.)

In its motion for summary judgment, the City argued that a claim was required in the instant case, and that Brooks failed to file a claim. In his opposition to the motion, Brooks argued that his letter of November 27, 1995 substantially complied with the Tort Claims Act. The copy of the letter is not included in the record on appeal. Since the City has failed to provide an adequate record, this court cannot determine whether the trial court erred in denying the motion. (9 Witkin Cal. Procedure (4th ed. 1997) Appeal § 518, pp. 562-563.)

3. Enforceability of Contract

The City contends that the terms of the alleged agreement were not sufficiently definite to constitute an enforceable contract.

"Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." (*Ladas v. California State Automobile Assn.* (*Ladas*) (1993) 19 Cal.App.4th 761, 770.) The terms of a contract are reasonably certain "if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 145, p. 169.)

"In considering expressions of agreement, the court must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty." (*Rivers v. Beadle* (1960) 183 Cal.App.2d 691, 695.) Moreover, "[t]he law leans against the destruction of contracts because of

uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained." (*Id.* at p. 697.)

The issue of whether the terms of a contract term are sufficiently definite is a question of law for the court. (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623.)

In the instant case, White's letters to plaintiff stated in relevant part: "[I]n the event of any involuntary separation, absent an illegal, immoral or unethical act, or an act of extreme misjudgment, I would work with you to ensure an adequate amount of advance notice to afford the normal professional courtesies (normally 90-120 days)."

Based on his discussions with White and Williams about the fire department, plaintiff was concerned about job security and protection of his career. Williams told plaintiff that the head of another department had negotiated a similar notice period of 90 to 120 days prior to termination. Thus, the parties' intent in drafting the language at issue was to address plaintiff's concerns. The parties' agreement provides that plaintiff would be guaranteed a notice period of between 90 and 120 days in the event of an involuntary separation. The phrase "I would work with you" refers to the city manager's assurance that the city would provide the notice that was "normally," or had been, given in prior cases.

The agreement was also sufficiently certain to determine that it had been breached. On November 22, 1995, Williams asked plaintiff to resign and told him that he should be gone in 30 days. She then suggested he meet with her on November 27. On that day, Williams told plaintiff to either resign or she would terminate his employment. When plaintiff refused to resign and leave his position within 30 days, Williams terminated his employment. By not giving plaintiff at least 90 days notice, the city breached its agreement with plaintiff.

The City's reliance on *Ladas*, *supra*, 19 Cal.App.4th 761 and *Rochlis v. Walt Disney Co.* (*Rochlis*) (1993) 19 Cal.App.4th 201, overruled on another

ground in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251, is misplaced. In *Ladas*, the court held that the defendant's oral promise to "consider" industry standards in setting commission rates for the plaintiffs was too vague and indefinite to create an enforceable contract. The court reasoned that the term did not provide a rational method for determining breach or computing damages. The *Ladas* court also noted that the promise was nothing more than "puffing language" used by employers to boast of its benefits. (*Id.* at p. 722.)

In *Rochlis*, the plaintiff claimed that the defendant had promised that he would receive salary increases and bonuses "appropriate" to his responsibilities and he would have "active and meaningful" participation in creative decisions. (*Rochlis*, *supra*, 19 Cal.App.4th at p. 213.) The court held that these terms were too vague and indefinite, and thus could not support a breach of contract claim. (*Id.* at pp. 213-214.) The court also reasoned the plaintiff's claim was beyond regulation by the court, because it would require the court to become involved in the daily operations of a business. (*Id.* at p. 214.)

In contrast to both *Ladas* and *Rochlis*, here the terms are sufficiently definite to create an enforceable contract. The agreement states the conditions under which the City was not required to provide notice, that is, if plaintiff committed "an illegal, immoral or unethical act, or an act of extreme misjudgment." It could also be readily determined whether the City provided 90 to 120 days' notice prior to an involuntary separation. Moreover, the term could not be construed as "puffing language" or necessitate a court's involvement in daily operations. Accordingly, we conclude that the parties' agreement to provide notice was sufficiently certain to constitute an enforceable contract.

III. Disposition

The judgment is affirmed. Each party to bear its own costs on appeal.

_____
Mihara, J.

We concur:

_____
Elia, Acting P.J.

_____
Wunderlich, J.